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No. 1079

In the Supreme Court of the United States

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1079

BURTON C. BOVARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. pp. 1a–5a) is not yet reported.

JURISDICTION

The order of the Court of Claims dismissing the petition was entered on February 6, 1963. The petition for a writ of certiorari was filed on May 7, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, on the facts of this case, the court below correctly held that petitioner was guilty of laches in the prosecution of his back-pay suit following his removal from the position of General Counsel of the Federal Housing Administration.

STATEMENT

Petitioner, a veterans preference eligible, served as General Counsel for the Federal Housing Administration (a grade GS–15 position) from 1940 to 1954.[1] On April 14th and May 7th, 1954, respectively, Norman P. Mason, Administrator of the FHA, placed petitioner on involuntary annual leave and served him with a notice of proposed adverse action pursuant to Section 14 of the Veterans' Preference Act of 1944, 5 U.S.C. 863. The notice enumerated nine charges of dereliction by petitioner in the performance of his duties as General Counsel. On July 15, 1954, petitioner was removed.

Petitioner appealed to the Civil Service Commission and, after a hearing, the Appeals Examining Office upheld the dismissal. Upon his appeal to the Commission's Board of Appeals and Review, the Board ruled that certain of the charges were defective for lack of specificity and that the balance of the charges were not supported by the evidence; accordingly, it recommended that petitioner be restored to his former position as General Counsel. Thereafter, the employing agency requested that the Commissioners reopen and reconsider the decision of its Board of Appeals and Review. The FHA appended to its review application copies of a report of the

[1] In compiling our statement we have reviewed in addition to the record filed in this Court, the Joint Appendix filed in *Borard* v. *Young*, 265 F. 2d 823 (C.A.D.C.), petitioner's initial suit for reinstatement which terminated with a dismissal of his complaint for failure to substitute successor government officials as parties

Senate Committee on Banking and Currency investigating FHA operations and an FHA investigation report.

By letters dated November 16, 1955, the Civil Service Commissioners notified both the employing agency and petitioner that the decision of the Board of Appeals and Review would be reopened and that each might submit "final representations." Petitioner submitted a detailed reply to the reports previously filed by the FHA. On December 29, 1955, the Civil Service Commissioners, after considering the entire record that was before the Board of Appeals and Review as well as the additional papers filed by both parties, reversed the Board's decision and upheld the propriety of petitioner's dismissal.

On February 14, 1956, petitioner instituted suit in the district court seeking reinstatement. Along with Norman P. Mason he named Civil Service Commissioners Philip Young, George M. Moore, and Frederick J. Lawton as party defendants. Defendant Young was succeeded by Commissioner Harris Ellsworth on April 18, 1957. Defendant Moore was succeeded by Commissioner Christopher H. Phillips on April 18, 1957, who was succeeded by Commissioner Bernard L. Flanagan on January 2, 1958, who was in turn succeeded on September 12, 1958, by Commissioner Barbara Bates Gunderson. Petitioner made no effort to substitute the successors to former

Commissioners Young and Moore within six months after their taking office.[2]

Ultimately the parties filed cross-motions for summary judgment, and, on July 15, 1958, the district court granted the defendant's motion. On March 19, 1959, pursuant to petitioner's appeal, the Court of Appeals for the District of Columbia Circuit remanded the cause to the district court with instructions to dismiss the complaint for failure to substitute successor parties.

On June 24, 1960, approximately fourteen months after the court of appeals rendered its decision, petitioner filed his petition in the court below seeking back pay from the date of his removal, July 15, 1954, to date of judgment. That court, on February 6, 1963, concluded that there was an inexcusable delay in bringing the present action and that petitioner's claim was barred by laches.

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[2] Fed. R. Civ. P. 25(d), 28 U.S.C., provided in pertinent part at that time as follows:

"When an officer of the United States, or of the District of Columbia, the Canal Zone, a territory, an insular possession, a state, county, city, or other governmental agency, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. * * *"

And Fed. R. Civ. P. 6(b) provided that the court may not extend the time for taking action under Rule 25. Rule 25 has since been amended. See Fed. R. Civ. P. 25(d), 28 U.S.C. (1958 ed. Supp. III App.).

ARGUMENT.

1. Petitioner's contention that the doctrine of laches is confined to suits in equity and mandamus, and hence inapplicable to actions for back pay, is entirely unfounded. The Court of Claims, as petitioner concedes, has consistently invoked that doctrine as a bar to back-pay actions brought without due diligence by discharged federal personnel.[*] And this Court has thrice upheld the dismissal of suits for compensation or reinstatement by government employees on grounds of unreasonable delay. *United States ex rel. Arant* v. *Lane*, 249 U.S. 367; *Nicholas* v. *United States*, 257 U.S. 71; *Norris* v. *United States*, 257 U.S. 77. Petitioner argues that *Arant*, though admittedly based on laches, was an action in mandamus, while *Nicholas* and *Norris*, both suits for compensation, rested not upon laches but upon the concept of "abandonment". However, the latter distinction is purely semantic. In *Nicholas*, the Court made it clear (257 U.S. at 76) that it was applying the same principle it had applied in *Arant*, *i.e.*, that:

> * * * Public policy requires that the Government shall be seasonably advised of the attitude of its officers and employees attempted to be displaced when they assert illegal removal or suspension as a basis for the recovery of the office or its emoluments. This is necessary in order that proper action may be taken in the public interest, as well as that which is required

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[*] See, *e.g.*, *Bailey* v. *United States*, 171 F. Supp. 951, 144 Ct. Cl. 729; *Miner* v. *United States*, 113 Ct. Cl. 801; *Henry* v. *United States*, 139 Ct. Cl. 362; *Kaufman* v. *United States*, 93 F. Supp. 1019, 118 Ct. Cl. 91.

> to vindicate the rights of one wrongfully removed from the public service. * * *

Whether the label be "laches" or "abandonment", this Court's holdings establish that federal employees must proceed with reasonable diligence in asserting their claims. A contrary holding, here as in *Arant*, might entail the payment of "two salaries * * * for a single service" and the "accumulation of unearned salary" for an extended period (249 U.S. at 372).

2. The only remaining question is whether the laches doctrine was properly applied in this case. Petitioner's removal was effected on July 15, 1954, and his administratives remedies were exhausted by December 29, 1955. At that time he could have instituted a back-pay suit in the court below. Instead he chose to bring suit in the district court, on February 14, 1956, seeking reinstatement. Petitioner's failure to substitute newly appointed members of the Civil Service Commission ultimately resulted in dismissal of that action by the court of appeals on April 27, 1959, forty months after the termination of his administrative proceedings.[*] Having served for fourteen years as the chief legal officer of a major governmental agency, petitioner should well have understood the substitution requirement. And, considering the time consumed in the fruitless earlier action, due diligence most certainly required that he proceed thereafter without further delay. Yet the instant

[*] In *Benson* v. *Zahner*, 289 F. 2d 756 (C.A. D.C.), certiorari denied, 366 U.S. 904, as here, the claimant's second suit was deemed barred by laches after his first action resulted in a dismissal because of his failure to obtain a substitution of parties.

action—where for the first time petitioner asserts a claim for back pay—was not filed in the court below until June 24, 1960, fourteen months after the adverse determination by the court of appeals and four and one-half years after the final decision of the Commission. In view of the time lapse attributable to petitioner's failure to prosecute diligently his original suit, the Court of Claims was plainly justified in concluding that the additional delay in commencing this action was "inexcusable" and, accordingly, that the case was an appropriate one for the application of laches.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1963.

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